



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF N-O-C- LLC

DATE: SEPT. 12, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a producer of theatrical shows, seeks to permanently employ the Beneficiary as a market research analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional holding an advanced degree for lawful permanent resident status.

On October 21, 2015, the Director, Texas Service Center, denied the petition.¹ The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner asserts that the Director should have considered the ability of an affiliated company to pay the proffered wage. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A petitioner must demonstrate its ability to pay a proffered wage from a petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of the Petitioner's annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, an ETA Form 9089, Application for Alien Labor Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The labor certification states the proffered wage of the offered position of market research analyst as \$44,824 per year. The petition's priority date is November 29, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

¹ The decision in the file of U.S. Citizenship and Immigration Services (USCIS) is undated. But USCIS electronic records and a copy of the decision submitted by the Petitioner indicate the decision's issuance on October 21, 2015.

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In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If the petitioner did not pay a beneficiary the full proffered wage each year, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the wages paid and the annual proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. See *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

In the instant case, the Petitioner did not establish that it employed and paid the Beneficiary during any relevant year.³

The record also does not establish the Petitioner's ability to pay based on its net income and net current assets. The Petitioner is a multi-member limited liability company (LLC) taxed as a partnership.⁴ The Petitioner submitted a copy of its federal income tax return for 2013. Its IRS Form 1065, U.S. Return of Partnership Income, reflects a net loss of -\$29,530 and net current liabilities of -\$1,230,848. These negative amounts do not equal or exceed the annual proffered wage of \$44,824 in 2013.

Although requested by the Director in his request for evidence dated March 6, 2015, the Petitioner did not submit a copy of its federal tax return, audited financial statement, or annual report for 2014. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Further, although the Director indicated in his decision that the petition was being denied, in part, due to the Petitioner's failure to submit its federal tax return, audited financial statement, or annual report for 2014, the Petitioner did not submit any of these documents on appeal.

Thus, based on examinations of the wages paid to the Beneficiary and the Petitioner's amounts of net income and net current assets, the record does not establish the Petitioner's ability to pay the proffered wage from the priority date onward.

² Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. See, e.g., *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

³ The Beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2013 and 2014 indicate that she was employed by [REDACTED] a separate entity.

⁴ An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership, or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3.

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The Petitioner states that it receives regular funding from its managing member, another LLC that it says owns 70 percent of its operations. See Del. Code Ann. tit. 6, § 18-403 (allowing the manager of a Delaware LLC to make contributions to it). The Petitioner provided general ledger accounts and lists of transactions in 2013 and 2014 as evidence of the other LLC's contributions. The record also contains copies of the managing member's federal income tax returns, indicating its generation of sufficient annual amounts of net income to pay the Beneficiary's proffered wage in 2013 and 2014.

The Petitioner states that its affiliates operate nine theaters on Broadway and many more regional theaters throughout the United States. For the past 15 years, the Petitioner states that the group has expanded its business internationally, including into China. The Petitioner asserts that USCIS improperly disregarded evidence that the Petitioner "was one piece of an elaborate corporate arrangement for one of the largest producers of live entertainment on [REDACTED] and throughout the world." The Petitioner states that "it flies in face of reality to conclude that one of the most successful ongoing live entertainment enterprises in the world does not have the ability to pay a \$45,000 per annum salary."

But, despite the achievements of the Petitioner's affiliates, the regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to demonstrate its ability to pay the proffered wage. Pursuant to Form I-140's instructions, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), [REDACTED] identified itself as the Petitioner in this matter in Part 1 of the form. Pursuant to 8 C.F.R. § 204.5(g)(2), the Petitioner must therefore demonstrate its own ability to pay the proffered wage. See *Sitar Rest. v. Ashcroft*, No. CIV. A. 02-30197-MAP, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003) (finding "that nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage").

The Petitioner asserts that the Director's decision erred in citing *Matter of Matter of M-*, 8 I&N Dec. 24 (BIA 1958) and *Matter of Aphrodite Invs. Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The Director referred to the cases to support the proposition that USCIS cannot consider the assets of a company's members or other enterprises in determining its ability to pay a proffered wage. The Petitioner notes that those cases held only that corporations are separate entities from their shareholders and may therefore file visa petitions for their shareholders. But, if a corporation is a separate legal entity, its shareholders and other entities are not legally obliged to pay a proffered wage that it offers.

An LLC, like a corporation, is a legal entity separate and distinct from its members. The debts and obligations of the LLC generally are not the debts and obligations of the members.⁵ A member's liability is limited to his or her initial investment. Thus, the total income and assets of the members and their ability, if they wished, to pay the LLC's debts and obligations, cannot be utilized to demonstrate the Petitioner's ability to pay the proffered wage. The Petitioner must show the ability to pay the proffered wage out of its own funds.

⁵ Although this general rule might be amenable to alteration pursuant to contract or otherwise, as discussed herein, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

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The Petitioner provided a copy of its First Amended and Restated Limited Liability Company Agreement (LLC Agreement).⁶ At Section 2.1, the LLC Agreement states that no member shall be required to make any additional capital contributions to the Petitioner beyond its initial contribution. While the LLC Agreement refers to a separate “Management Agreement” pursuant to which the Petitioner may receive management fees, the Management Agreement was not provided by the Petitioner. The LLC Agreement does not indicate the obligation on the part of any member, including the managing member, to pay the wages of the Petitioner’s employees.

The record also contains two letters from [REDACTED] accountant for the Petitioner.⁷ In a letter dated May 22, 2015, he stated that if necessary, the Petitioner “is funded by one of the family of [REDACTED] companies, [REDACTED]. In a letter dated December 14, 2015, [REDACTED] again stated that the Petitioner is “fully funded through [REDACTED].” However, he did not indicate that [REDACTED] has a contractual duty to fund the Petitioner. He discussed consulting fees that were paid to the Petitioner by [REDACTED] but did not provide the contract(s) pursuant to which these consulting fees were generated and paid. [REDACTED] assertions, unsubstantiated by supporting evidence, are insufficient to satisfy the Petitioner’s burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.* 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

As previously indicated, we may also consider evidence of a petitioner’s ability to pay beyond its net income and net current assets. *See Sonegawa*, 12 I&N Dec. at 614-15. We may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay the proffered wage.

In the instant case, the record indicates that Petitioner was organized in 2006 and employed two people at the time of the petition’s filing. But because the Petitioner submitted a copy of only one federal income tax return, the record does not indicate whether its business has grown since its organization in 2006. Further, without the Petitioner’s federal tax return, audited financial statement, or annual report for 2014, the petition cannot be approved. *See* 8 C.F.R. § 204.5(g)(2).

Based on its association with its affiliates, the Petitioner appears to have a good reputation in its industry. But, unlike in *Sonegawa*, the record does not indicate the occurrence of any uncharacteristic business expenditures or losses. The record also does not indicate that the Beneficiary will replace a current employee or outsourced service. Thus, pursuant to *Sonegawa*, the

⁶ The LLC Agreement indicates that the three members of the Petitioner are [REDACTED] (75.8%), [REDACTED] (18.1%), and [REDACTED] (6.1%). The Petitioner’s 2013 tax return, however, indicates that it has four members. The Schedules K-1 to the Form 1065 identifying those members were not provided by the Petitioner.

⁷ The record does not establish that [REDACTED] is a certified public accountant (CPA). An online search of the New York State Office of Professions website does not indicate that he is a licensed CPA in New York. *See* <http://www.op.nysed.gov/opsearches.htm> (last visited August 31, 2016).

totality of the circumstances in this case does not establish the Petitioner's continuing ability to pay the proffered wage.

II. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore dismiss the appeal.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1391; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of N-O-C- LLC*, ID# 17901 (AAO Sept. 12, 2016)